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**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1943.**

**CHESTER BOWLES, Administrator,  
Office of Price Administration,  
Appellant,**

**vs.**

**MRS. KATE C. WILLINGHAM and  
J. R. HICKS, JR.,**

**Appellees.**

**No. 464.**

**BRIEF OF COUNSEL FOR APPELLEES.**

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J. R. HICKS, JR.,

Appellees.

No. 464.

**BRIEF OF COUNSEL FOR APPELLEES.**

**STATEMENT OF THE CASE.**

We realize that under Rule 27 (4) of this Court we need make no statement of the case beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement of the other side. However, as we conclude the preparation of this brief, we have not been served with the brief of the appellant, so we must make a fairly full statement of the case.

On July 14, 1943, Mrs. Willingham presented to one of the Judges of the Superior Court of Bibb County, Georgia

(Tr. p. 9), her petition for injunction. Andrew Lyndon, as Rent Director of the Macon, Georgia, Defense Rental Area, was named as defendant.

In May of 1941 she had purchased a certain housing accommodation in the City of Macon, which City was a part of the Macon, Georgia, Defense Rental Area. Upon purchasing the property, she, prior to July 1, 1942, changed it so as to result in an increase in the number of dwelling units therein. On January 30, 1942, the Congress passed the Emergency Price Control Act (U. S. C. A., Title 50, App., Sections 901 et seq.). On April 28, 1942, the Price Administrator issued a declaration under this Act as to the Macon, Georgia, Defense Rental Area, and on June 30, 1942, issued Maximum Rent Regulation Number 26, establishing maximum rents for housing accommodations, freezing rents, generally speaking, as of April 1, 1941. However, her property was not rented on April 1, 1941, and therefore its rentals were governed by other provisions of the regulation which permitted her to charge the first rents she received for the housing accommodations prior to July 1st, 1942, subject to reduction by the Administrator as provided in Section 5 (c) of the Regulation:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that: (1) The maximum rent for housing accommodations under paragraphs (c), (d), or (g) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1st, 1941 \* \* \*"

(Fed. Reg., Vol. 7, page 4907.)

Her situation fell under paragraph (d) of Section 4 of the Regulation (Fed. Reg., Vol. 7, page 4906), having been changed between April 1, 1941, and July 1, 1942, so as to result in an increase of the number of dwellings therein.

After the housing accommodations had been so changed, she, in the summer of 1941, rented them at certain specified rentals which the tenants agreed to pay and did pay.

On June 14, 1943, the defendant served her with a so-called "notice to landlord of proceedings on Rent Director's initiative," in which he set out that he proposed to reduce these rentals, and gave her the opportunity to file objections to the proposed action. She furnished evidence, but at the time of the filing of her suit no orders had been issued. She charged that she would have no complete and adequate remedy at law after the Rent Director issued the orders, but that she must comply with them at the risk of heavy penalties, civil and criminal.

She charged that Section 5 (c) of the Rent Regulation was unconstitutional and that Section 2B of the Emergency Price Control Act [U. S. C. A., Title 50, App., Section 902 (b)] was unconstitutional. She charged that the defendant was without legal authority to interfere with her contractual relationships with her tenants and without legal authority to issue the proposed order.

She prayed that the defendant be enjoined from issuing any order reducing the rents on the housing accommodations, and for such other and further relief as might seem meet and proper.

The Judge of the State Court on July 14th, 1943, issued an ex parte restraining order, restraining the defendant from issuing such order (Tr., page 16). The defendant was ordered to show cause on September 6, 1943, why he should not be enjoined.

In that situation, on July 20th, 1943, Prentiss M. Brown, Administrator of the Office of Price Administration, filed his complaint in the District Court of the United States for the Macon Division of the Middle District of Georgia, against Mrs. Willingham and J. R. Hicks, as Sheriff of Bibb County. He charged that Mrs. Willingham had engaged in acts and practices which constituted violations of

the Emergency Price Control Act by filing the bill in the State Court and procuring the restraining order. He charged that the order and judgment of the Superior Court of Bibb County, Georgia, was utterly void for that that Court was without jurisdiction to entertain the petition upon which it was based, or to issue the order, the State Court having been divested of such jurisdiction by the terms of the Emergency Price Control Act of 1942, and particularly Section 204 (d) thereof. [Section 204 (d) is U. S. C. A., Title 50, App., Section 924 (d), page 327.] (Tr., pages 1-4.)

He prayed that Mrs. Willingham and all persons in active concert or participation with her be enjoined from further prosecution of the State Court proceedings, and that the defendant Hicks be enjoined from serving the order or any subsequent orders entered in the State Court proceedings. A rule nisi was issued by Judge Lovett, and properly served.

Later, in an amendment to this complaint, the Price Administrator set up that he brought his action pursuant to Section 205 (a) of the Act [U. S. C. A., Title 50, App., Section 925 (a)], and pursuant to his right as an officer of the United States authorized to sue, and to effectuate the public policy of a statute of the United States.

Jurisdiction of the District Court was invoked under Section 205 of the Act and under Title 28, U. S. C. A., Section 41 (1).

Mrs. Willingham filed her defensive pleadings in the Federal Court and an amendment thereto in which she averred:

(a) An injunction should not be granted against her for the reason that such grant would be violative of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 378).

(b) She had not engaged in acts and practices constituting violations or attempted violations of the Price Control

Act, but had simply asserted her rights as a citizen in the State Courts of Georgia to test the validity of the Emergency Price Control Act;

(c) Section 5 (c) (1) of the Rent Regulation Number 26 was unconstitutional and void;

(d) Section 204 (d) of the Emergency Price Control Act, seeking to divest the Superior Court of Bibb County of jurisdiction to determine the validity of the Regulation and the Act, was beyond any constitutional power of the Congress and that section is therefore unconstitutional and void under Article VI of the Constitution;

(e) Section 2 (B) of the Act was unconstitutional and void;

(f) If the Rent Director were to issue the proposed order, such order would be unconstitutional and void for that the Congress had not delegated to the "Rent Director" the power which he sought to exercise, and the Act of the Price Administrator in seeking to delegate that power to the Rent Director was unconstitutional and void.

The case was heard on the appellees' motion to dismiss the action. The motion was sustained on the ground that the rent provisions of the Price Control Act and the regulations promulgated pursuant thereto were unconstitutional and invalid (Tr., page 26).

This order was amended by the Court stating that it did not deem it necessary to decide and did not decide whether Section 204 (d) of the Act was constitutional in so far as it operates or might operate to restrict the jurisdiction of the State Court in the case of Mrs. Willingham against the Rent Director (Tr., page 39).

An appeal was allowed by the District Judge (Tr., page 41). Your Honors have noted probable jurisdiction (Tr., page 45).

## POINTS OF LAW.

We think that under the assignments of error (Tr., pages 41-42) and the pleadings in the District Court, the following points of law are involved:

1. The District Court, if it had jurisdiction of the case at all, had jurisdiction to determine the constitutionality and validity of the Emergency Price Control Act, Maximum Rent Regulation Number 26, and all contemplated orders thereunder;

2. The Rent Control Sections of the Emergency Price Control Act are unconstitutional and void, being violative:

(a) of Article I, Section 1, of the Constitution of the United States, and,

(b) of the Fifth Amendment to the Constitution of the United States;

3. Even if the Act should be held to be valid, Section 5 (c) of Maximum Rent Regulation Number 26 is unconstitutional and void;

4. By reason of the provisions of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 379), the District Court of the United States for the Middle District of Georgia had no jurisdiction to grant the writ of injunction to stay the proceedings filed by appellee, Mrs. Willingham, in the Superior Court of Bibb County, Georgia;

5. The provisions of Section 204 (d) of the Emergency Price Control Act, purporting to divest the Superior Court of Bibb County, Georgia, of jurisdiction and power to consider the validity of a Rent Regulation or to stay, restrain, enjoin, or set aside any provision of the Act or any regulation or order issued thereunder, are unconstitutional and void;

6. The proposed order of the Rent Director would have been unconstitutional and void, but appellee would have been forced to obey it.

**The District Court, If It Had Jurisdiction of the Case at All, Had Jurisdiction to Determine the Constitutionality and Validity of the Emergency Price Control Act, Maximum Rent Regulation Number 26, and All Contemplated Orders Thereunder.**

This question arises by reason of provisions of Sections 204 (d) of the Emergency Price Control Act [U. S. C. A., Title 50, App., Section 924 (d), page 327]. Those provisions are:

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 (Section 902, U. S. C. A., Title 30, App.), \* \* \* and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulation or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.”

In his original complaint in the Federal District Court the appellant asserted:

“Jurisdiction of this action is conferred upon the Court by Section 205 of the Act, as well as the general equity jurisdiction of this Honorable Court” (Tr., page 2, paragraph 3).

Section 205 of the Act is found in U. S. C. A., Appendix, as Section 925, Title 50, and is in part:

“Whenever in the judgment of the Administrator any person has engaged or is about to engage in any

acts or practices which constitute or will constitute a violation of any provision of Section 4 of this Act (Section 904 of this Appendix), he may make application to the appropriate Court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

That section further provides in subsection (c) thereof:

"The District Court shall have jurisdiction . . . of all other proceedings under Section 205 of this Act . . ." [U. S. C. A., Title 50, App., Section 925 (c), page 342].

The Act further defines the term "District Court" as meaning, among other definitions, any District Court of the United States [U. S. C. A., Title 50, App., Section 942 (k), page 350].

The appellant amended this paragraph of his complaint by adding thereto:

"as provided in Title 28, U. S. C. A., Section 41 (1)" (Tr., page 7).

Section 41(1) of Title 28, U. S. C. A., provides that the District Courts shall have jurisdiction of all suits of a civil nature brought by any officer of the United States authorized to sue.

Therefore, jurisdiction to entertain this action emanated from acts of Congress. But the inherent right of a Court to declare acts of Congress unconstitutional does not emanate from any act of Congress. That power has its source in the supremacy clause of the Constitution of the United States, which provides:

“This Constitution, and the Laws of the United States **which shall be made in pursuance thereof** . . . shall be the Supreme Law of the Land . . .” (Constitution, Article VI, Par. 2).

The judicial power of the United States is vested in the Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish (Constitution, Article III, Section 1).

We recognize perfectly the rule that a District Court can entertain only such cases as Congress gives it jurisdiction to try. Jurisdiction to try any case or class of cases may be altogether withheld. But the Congress has not withheld jurisdiction to try this case. On the contrary, the appellant contends that the Emergency Price Control Act expressly confers power upon the District Court to try it. The appellant contends that the District Court had jurisdiction to entertain his bill under the provisions of the Judiciary Act [U. S. C. A., Title 28, Section 41 (1)]. Subject to certain limitations, we accept his contention.

So, as the District Judge well said in his opinion (Tr., pages 27-28):

“If Congress prohibits an inferior Court from trying a case, the Court cannot entertain it and, if Congress confers jurisdiction to try a case, the Court cannot refuse to accept jurisdiction. It is bound to hear and decide the case. But, having directed the Court to try the case, Congress has no authority also to direct the Court to render judgment in accordance with the terms of a void act in disregard of the supreme law of the land. The distinction is that, while Congress can determine what cases a Court can try, it cannot direct what law shall control the decision.”

The able and learned Judge might have gone further. He might well have pointed out that under the Supremacy

Clause of the Constitution, not **all** laws of the United States are, next to the Constitution, supreme. Only those laws are supreme which **shall be made in pursuance of the Constitution.**

"It is to be observed, that the Supreme Court had the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the Constitution. **This power they will hold under the Constitution, and independent of the Legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the President, with the advice and consent of the Senate, the power of making treaties, or appointing ambassadors.**

"In determining these questions, the Court must and will assume certain principles from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the Legislature, and will be the rule by which they will explain their powers. This appears evident from this consideration, that if the Legislature pass laws, which, in the judgment of the Court, they are not authorized to do by the Constitution, the Court will not take notice of them; **for it will not be denied that the Constitution is the highest or supreme law. And the Courts are vested with the supreme and uncontrollable power to determine in all cases that come before them, what the Constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the Constitution, unless we can suppose they can make a superior law give way to an inferior."**

Brutus on Judicial Review, quoted by Edward S. Corwin, in "Court Over Constitution," page 244. (Emphasis ours.)

"The Legislature can exercise only such powers as are given them by the Constitution, they cannot assume any of the rights annexed to the judicial, for

this plain reason, that the same authority which vested the Legislature with their powers, vested the judicial with theirs—both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the Legislature, as the Legislature do of the judicial. . . . The Supreme Court then have a right, independent of the Legislature, to give a construction to the Constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the Legislature pass any laws, inconsistent with the sense the Judges put upon the Constitution, they will declare it void; and therefore in this respect their power is superior to that of the Legislature. . . .”

(Ibid, pages 257, 258.)

It is no answer to this argument to say that the Supreme Court could declare an unconstitutional Act void, and that that Court could not be deprived of such power by the Congress. For, as Judge Deaver points out:

“Congress have not power to give original jurisdiction to the Supreme Court in cases other than those described in the Constitution.’ *Marbury v. Madison*, 5 U. S. 137 (2). If Congress can withhold power to determine the validity of an Act from one Court, it could withhold such power from all inferior Courts. It would follow that Congress could require an inferior Court to render judgment in a case depending entirely on a void statute and prevent its validity from being passed on by any inferior Court. In a case, therefore, of which the Supreme Court has no original jurisdiction, the validity of the Act could never be questioned in any Court.”

Judge Deaver's conclusion as to his right to have determined the validity of the act is fully supported by authority.

In *Adkins v. Children's Hospital*, 261 U. S. 525, at page 544, is the following language:

"The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A Congressional statute, on the other hand, is the act of an agency of this sovereign authority and if it is in conflict with the Constitution must fall, for that which is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power—that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case, there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law, and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect and binding on no one. This is not the exercise of a substantive power to review and nullify Acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the Court, to the determination of which must be brought the test and measure of the law."

In *Smyth v. Ames*, 169 U. S. 466, at page 527, this Court said:

"The idea that any Legislature, State or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation."

In *United States v. Butler*, 297 U. S. 1, at page 62, the Supreme Court said:

“There should be no misunderstanding as to the function of the Court in such a case. It is sometimes said that the Court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. The Constitution is the supreme law of the land, ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty, to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and having done that, its duty ends.”

This Court, in *Carter v. Carter Coal Company*, 298 U. S. 238, at page 296, said:

“The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute, but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and therefore by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the Supreme law and reject the inferior statute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given

great weight, *Adkins v. Children's Hospital*, 261 U. S. 525, 544; but their opinion, or the Court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter v. United States*, 295 U. S. 495, 549-50."

In *Chicago Railway Company v. Wellman*, 143 U. S. 339, at page 345, this Court said:

"Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question 'involving the validity of any Act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the Legislature to so enact, the Court must, in the exercise of its solemn duties, determine whether the act is constitutional.'

"Although the doctrine was not established without dispute, it is now a settled principle of the American system of constitutional law that the Courts have inherent authority to determine whether statutes enacted by the Legislature transcend the limits imposed by the Federal and State Constitutions and to determine whether such laws are or are not constitutional."

- 11 American Jurisprudence, page 709 (Section 86),  
citing *United States v. Butler*, supra;
- Adkins v. Children's Hospital*, supra;
- McCrary v. United States*, 195 U. S. 27, 55;
- Income Tax Cases*, 157 U. S. 429;
- Powell v. Pennsylvania*, 127 U. S. 678;
- Nashville v. Cooper*, 6 Wall. 250;
- Dodge v. Woolsey*, 18 Howard 331;
- Hamilton Bank v. Dudley*, 2 Peters 492;
- Houston v. Moore*, 5 Wheaton 1;
- Fletcher v. Peck*, 6 Cranch 87;
- Marbury v. Madison*, 1 Cranch 137.

"If the Constitution prescribes one rule and the law another and a different rule, it is the duty of the Courts to declare that the Constitution and not the law governs in cases before them for judgment."

*Ibid.*, page 711.

The power of construing the Constitution must necessarily be lodged in some department of the government to insure that practical sanction to its mandate which seems essential for the preservation of its validity and force.

*Ibid.*, page 711, citing *Wells v. Missouri Pacific R. Co.*, 110 Mo. 286.

"In no other way known to intelligent men can a government by written Constitution exist, except there be power somewhere to make statutes square with that instrument, and to say whether or not they do. That high power is now lodged with the Courts; there it has been for generations and there it must remain until the people by the exercise of their sovereign will, expressed in a constitutional way, take it away and lodge it elsewhere."

*Tubercular Hospital v. Peter*, 253 Mo. 520, 161 S. W. 1155.

The case of *Abelman v. Booth*, 21 Howard 506, contains potent language.

The Court pointed out (page 518) that the judicial power was conferred on the General Government in clear, precise and comprehensive terms. "It is declared that its judicial power shall (among other subjects enumerated) extend to all cases in law and equity arising under the Constitution and laws of the United States . . ." (Emphasis ours.)

Different language is employed in the Constitution when conferring supremacy upon the laws of the United States than when conferring jurisdiction upon its Court. In the Supremacy Clause, it provides that "this Constitution and the laws of the United States **which shall be made in pursuance thereof**, shall be the supreme law of the land, and obligatory upon the Judges in every State" (*Ibid.*, page 519).

After calling attention to that fact the Court said:

“The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land . . . .” (Ibid., page 519).

And at page 520:

“And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its Courts shall extend to all cases arising under ‘this Constitution’ and the laws of the United States—leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limit of its delegated powers, or be an assumption of power beyond the grants in the Constitution. This judicial power was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that an Act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the Courts of the United States to declare it unconstitutional and void. The grant of judicial power is not confined to the administration of laws passed in pursuance to the provisions of the Constitution, nor confined to the interpretation of such laws; but, by the very terms of the grant, the Constitution is under their view when any Act of Congress is brought before them, and it is their duty to declare the law void, and refuse to execute it, if not pursuant to the legislative powers conferred upon Congress.”

In a very recent case (Schneidermann v. United States . . . U. S. . . ., 63 Sup. Ct. 1333), in the concurring opinion.

of Mr. Justice Rutledge (63 Sup. Ct. 1357) occurs this apt language:

**"Congress has, with limited exception, plenary power over the jurisdiction of the Federal Courts. But to confer the jurisdiction and at the same time nullify entirely the effects of its exercise are not matters heretofore thought, when fairly faced, within its authority."**

It may be argued that granting that the Court had **jurisdiction** to pass upon the constitutionality of the **Act**, it had no power or jurisdiction to consider the validity of the rent regulation [Act, Section 204 (d), 50 U. S. C. A., App., Section 924 (d)].

In the recent case of *Lockerty et al. v. Phillips*, ... U. S., ... 63 Sup. Ct. 1019, at the conclusion of the opinion Your Honors said:

**"We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in Courts other than the Emergency Court of Appeals, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it."**

That occasion seems now to present itself.

To say that a Court would have the right to declare the Act unconstitutional, but not a regulation issued under it, would make the creature superior to the creator.

Under the Act the Administrator is impotent until he implements himself with a regulation. In order to effectuate the purposes of the Act he must first issue a declaration and then a regulation. Rents are not regulated, stabilized, or "frozen" by the terms of the Act. Rents are regulated only when the regulation is promulgated by the Administrator pursuant to the Act. The Act is without

life until the regulation breathes life into it. A property owner could not come into any Court and assail the validity of the Act unless a regulation had been issued under the Act. The Act affects no property owner until a regulation is issued. No property owner is in position to complain until he is subjected or about to be subjected to a regulation. A litigant can question a statute's validity only when and so far as it is about to be applied to his disadvantage.

**Bank v. Craig, 181 U. S. 548;**

**Brown Forman Co. v. Kentucky, 217 U. S. 563;**

**Board of Trade v. Olsen, 262 U. S. 1.**

That is demonstrated by the provisions of Section 203 (a) of the Act (U. S. C. A., Title 50, App., Section 923):

“Within a period of sixty days after the issuance of any regulation or order under Section 2 (Section 902 of this Appendix) . . . any person subject to any provision of such regulation, order . . . may . . . file a protest specifically setting forth objections to any such provision. . . .”

When and if that protest is denied, the person aggrieved may file a complaint with the Emergency Court of Appeals.

But until a regulation is issued, no person has any right to “protest” against the terms of the mere Act. The regulation gives the Act vitality. It is not the Act alone which deprives property owners of their property (we say unconstitutionally), but the Act fortified, vitalized and implemented by the Regulation.

Section 205 (a) of the Act [U. S. C. A., Title 50, App., Section 925 (a)] provides that whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute a

violation of Section 4 of the Act (Section 904, U. S. C. A., Title 50, App.), the Administrator may seek injunctive relief from the appropriate Court. But a person cannot violate Section 4, until that section shall have been vitalized by the issuance of a regulation and/or order. Under Section 4 (a) it is unlawful (among other things) for a person to receive rent for any defense-area housing accommodations in violation of any regulation or order under Section 2 of the Act (Section 902, U. S. C. A., Title 50, App.). But there is not any such thing as a "defense-area housing accommodation" until such "defense-area" has been established by the Administrator by a declaration under the Act. There is not any such thing as a "maximum rent" for that "defense-area housing accommodation" until that maximum rent shall have been established by a regulation issued by the Administrator under the terms of the Act.

The appellant, when he filed his complaint in the Court below, recognized that the appellee could not possibly have violated or attempted to have violated the Act standing alone. She was charged with violations and attempted violations of the Act, "the same being also violations and attempted violations of Maximum Rent Regulation No. 26" (Complaint, Paragraph 1, Tr., page 1). The appellant brought his action "to restrain violations and attempted violations of and to enforce compliance with, said "Act and said Regulation as amended" (Complaint, Paragraph 2, Tr., page 2). One of the prayers, and the principal prayer, of his complaint is that she be enjoined from "performing any further acts or practices in violation of the Emergency Price Control Act of 1942 and Maximum Rent Regulation No. 26" (Tr., page 4).

We paraphrase the language of Judge Deaver in his opinion in *Payne v. Griffin* (Tr., page 30):

In this case the appellant sought an injunction against the appellee. If a right to such injunction exists at all,

it exists solely by reason of the statute and the regulation made pursuant to the statute. If the statute is valid and the regulation is valid, they together may create a cause of action entitling the appellant to an injunction. If the statute is not valid, the regulation is nothing, and no cause of action exists. Jurisdiction to try the case is jurisdiction to determine whether appellant is entitled to an injunction. To decide that question, the Court was bound to ascertain what law governed. If the regulation is valid, it has the form of law, but it is no law apart from the statute itself. The statute and the regulation are interdependent in creating the cause of action and there is no cause of action unless both are valid. Whether either is valid depends upon its conformity to the supreme law of the land. If by that supreme law the statute is void, the regulation falls and there is no law authorizing the grant of an injunction.

The observation of an unconstitutional law cannot be compelled.

*Itasca Paper Co. v. Niagara Fire Ins. Co.*, 220 N. W. 425, 175 Minn. 73.

A void statute confers no right and imposes no obligations.

*City of Ottawa v. Hulse*, 332 Ill. 286, 163 N. E. 685.

An unconstitutional law, being void, imposes no duty and confers no authority, and creates no obligation which can be enforced by subsequent legislation.

*Anderson v. Lehmkuhl*, 119 Neb. 451, 229 N. W. 773.

Act empowering municipalities having board of aldermen to change ward lines providing for unconstitutional classification requires resolution thereon to be set aside.

*Eckert v. Board of Aldermen of Paterson*, 147 Atl. 380, 7 N. J. Misc. 850.

“An unconstitutional Act is not a law; it confers no rights, it imposes no duties, it affords no protection, it creates no office, it is, in legal contemplation, as inoperative as though it had never been passed.”

Norton v. Shelby County, 118 U. S. 425, 426, 442.

**The Rent Control Sections of the Emergency Price Control Act Are Unconstitutional and Void, Being Violative of Article I, Section 1, of the Constitution of the United States.**

(The “Rent Control Sections” of the Emergency Price Control Act, consideration of which are necessary for determination of this case, are, we think, Section 1 [U. S. C. A., Title 50, App., Section 901]; Sections 2 (b), 2 (c) 2 (d), 2 (g) [U. S. C. A., Title 50, App., Section 902 (b, c, d, g)]; Section 4 (a) [U. S. C. A., Title 50, App., Section 904 (a)]; Section 201 (a) and (b) [U. S. C. A., Title 50, App., Section 921 (a) and (b)]; Section 204 [U. S. C. A., Title 50, App., Section 924]; Section 205 (a) [U. S. C. A., Title 50, App., Section 925 (a)]; Section 302 (d, e, f, g, k) [U. S. C. A., Title 50, App., Section 942 (d, e, f, g, k)].)

We approach this phase of the case with the firm conviction that the following statement of this Court in *A. L. A., Schechter Poultry Corporation v. United States*, 295 U. S. 495, 530, 55 Sup. Ct. 837, 843, remains the law of the land:

“ . . . the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in **laying down policies and establishing standards**, while leaving to selected instrumentalities the making of **subordinate rules** within prescribed limits and the **determination of facts** to which the policy as declared by the Legislature is to apply. But we said (in *Panama Refining Co. v. Ryan*, 293 U. S. 388, 421, 55 Sup. Ct. 241) that the constant

recognition of the validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitution system is to be maintained." (Emphasis and parenthesis ours.)

Immediately following the language quoted the Court said:

"Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing 'code of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."

We must examine the Rent Control provisions of this Act to determine whether Congress has itself established the standards of legal obligation, or whether, by the failure to enact such standards, has attempted to transfer that function to others.

We confidently assert that the Congress failed to enact standards of legal obligation, but, on the contrary, attempted to transfer that function to the Price Administrator.

The Act, with respect to rents, is not self-effective.

The Act created an office of Price Administration to be under the direction of a Price Administrator, to be appointed by the President, by and with the advice and consent of the Senate. That Administrator was authorized **whenever in his judgment** such action was necessary or proper in order to **effectuate the purposes** of the Act to issue a declaration setting forth the **necessity for, and recommendations** with reference to the stabilization or reduction of rents for **any** defense-area housing accommodations **within a particular defense rental area** [Act, Section 2 (b)].

U. S. C. A., Title 50, App., Section 902 (b)]. If, within sixty days after the issuance of any such recommendations, rents for any such accommodations within such defense-rental area have not, in the judgment of the Administrator, been stabilized or reduced, in accordance with the recommendation, the Administrator may by regulation or order establish such maximum rent or maximum rents as in his judgment will be generally fair and equitable and will effectuate the purposes of the Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations on or about April 1st, 1941 (or if, prior or subsequent to April 1st, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date (not earlier than April 1st, 1940), which in the judgment of the Administrator does not reflect such increases. He shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such regulations or orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned. Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act.

Even with the appointment of the Administrator, rent control did not become effective throughout the United States or in any part of the United States.

It was necessary for the Administrator to take an initial step before the machinery began to operate. His first step was when, in his judgment, it was necessary or proper to effectuate the purposes of the Act to issue a declaration setting forth the necessity for and recommendations with reference to reduction of rents within a **particular defense rental area**.

The question naturally occurs: What is a "defense rental area"?

That question is answered, as far as it can be answered, by Section 302 (d) of the Act [U. S. C. A., Title 50, App. 942 (d)]:

"The term 'defense rental area' means the District of Columbia and any area designated by the Administrator as an area where defense activities have resulted or **threatened** to result in an increase in the rents for housing accommodations inconsistent with the purposes of this Act." (Emphasis ours.)

Therefore, in order for rent control to have become effective in any part of the United States outside of the District of Columbia, it was necessary for the Administrator to have "carved out" that area and denominated it as a "defense rental area."

By what standards was the Administrator compelled by law to act when he made that denomination of a defense rental area? When he segregated one part of the United States from the rest of it and denominated it as a defense rental area?

The only standard, if such it may be called, is that it must have been an area in which in the **judgment** of the Administrator **defense activities** have resulted in an increase in rents inconsistent with the **purposes of the Act**.

If this is a "standard," the criteria of the standard are: (a) The judgment of the Administrator; (b) Defense activities; (c) The purposes of the Act.

(a) The determination of "his judgment" required him to make no finding of facts, to consult no one, to confer with no one, to give no one a hearing. In the designation, the Act does not even compel him to consider recommendations from State or local officials. He did that "to such extent as he determined to be practicable" (Act, Section 2 (b), last three lines).

(b) What are "defense activities"? The only answer we can give is that defense activities are whatever activities the Administrator says are defense activities. Again with respect to "defense activities" in a given area, he is required to consult no one, confer with no one, hear no one, see no one, make no finding of facts.

(By Section 202 of the Act [U. S. C. A., Title 50, App., Section 922] he is **authorized** to make such studies and investigations and to obtain such information **as he deems necessary or proper** to assist him in prescribing a regulation.)

"Here, in effect, is a roving commission to inquire into evils and upon discovery correct them."

Schechter v. U. S., 295 U. S., at page 551.

(c) What are purposes of the Act?

The purposes of the Act are to stabilize prices and to prevent **speculative, unwarranted, and abnormal increases in prices and rents**; to eliminate and prevent profiteering; hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal marketing conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices, to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons

engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post-emergency collapse of values; to stabilize agricultural prices in the manner provided in Section 3; and to permit voluntary cooperation between the government and producers, processors, and others to accomplish the aforesaid purposes. (Emphasis ours.)

Does that list of purposes furnish a "standard"? If so, the Congress may appoint an Administrator "to correct all evils in the universe." Such a "standard" would be just as definite as the "purposes" of this Act.

The only place in which "rents" are mentioned in the purposes of the Act (Section 1) is the boldface portion of the foregoing quotation. Let us then fit those quoted words into the definition of "defense rental area" and see what kind of a standard we have:

The term "defense rental area" means any area designated by the Administrator as an area where defense activities have resulted or threatened to result in speculative, unwarranted, and abnormal increases in rents.

Is that definition a "standard" in the eyes of the law? What increase is speculative, and what unspeculative? What increase is warranted and what unwarranted? What increase is normal and what abnormal?

Only the Administrator can answer, and who can dispute him? What facts did he have before him when he determined that an increase in one area was normal, warranted, and unspeculative, and that in another abnormal, unwarranted and speculative?

The answer is: No one knows. The Administrator has proceeded with an "unfettered discretion."

"He (the Administrator) possesses here not only a figurative 'roving commission,' but one in potent lit-

eralness. He may move from State to State, from County to County, and according to the 'spirit moves' or in the measure of his last nocturnal sojourn, whether restful or restless, his morning meal palatable, or inedible, find or decline to find, as for that territorial locality where each morning discovered him, that it was an 'area where defense activities' have resulted or threaten to result in an increase in the rents for housing accommodations which will bring about speculative, unwarranted, and abnormal increases in rents which tend to defeat or obstruct the effective prosecution of the war. He (the Administrator) becomes the general agent of the Congress—first to choose the area for legislation, then to choose the character of the legislation that he believes suits the area selected for action, and there to enforce it in the manner he sees fit."

Roach v. Johnson, 48 Fed. Sup. 833.

Having "chosen the area" the Administrator then issued a declaration or recommendation.

What standard determined whether or not he should issue a declaration?

The first sentence of Section 2 (b) of the Act [Title 50, App., Section 902 (b), U. S. C. A.] furnishes the only answer: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for **any** defense-area housing accommodations within a particular defense-rental area." (Emphasis ours.)

Let us again transpose from the "purposes" of the Act, and we have this standard or formula:

Whenever in the judgment of the Administrator, such action is necessary, or proper in order to effectively prosecute the present war and to prevent speculative, unwarranted and abnormal increases in rents, he shall issue a

declaration setting forth the necessity for, and recommendations with reference to the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area.

The Court will find a typical "Designation and Rent Declaration" in Volume 7, Federal Register 1677. We shall supply a copy thereof as a part of the appendix to this brief. Of this designation and declaration the Court below has said:

"Without reciting all the statements in the rent Declaration and in the Regulation, it is sufficient to say that those documents, in effect, simply declare that in the Administrator's judgment the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary" (Tr., page 35).

In this "declaration" property owners were not advised (and the law does not require that they should be) of the basis of the Administrator's judgment. They were given no opportunity to be heard. The law furnished no standard as to what was a normal rent, a rent which reflected only normal, warranted and unspeculative rent. Suppose rents in a given area had increased over 1930, 1936, or 1939, how was the Administrator to determine whether that increase was normal or abnormal? Speculative or unspeculative? Warranted or unwarranted?

The law furnishes no standard except "the judgment of the Administrator"—and "unfettered discretion." But having determined that there had been an increase contrary to the purposes of the Act, the Administrator had to go further and recommend "the stabilization or reduction of rents for any defense-area housing accommodations" within the area. What standard is there for the Administrator to follow in deciding whether he should recommend a "stabilization" or a "reduction"? His judgment alone dictated the answer to this question. But, having

determined that they should be reduced, what standard is there for the Administrator to follow in deciding the quantity of the reduction? His judgment alone dictated the answer to this question. Having determined that rents should be reduced, he must next decide as to what housing accommodations in the area the reduction should apply. The Act authorizes him to recommend reduction of rents for "any defense-area housing accommodations" within the area. Which should he select for treatment, and which should he leave be? The Act fails to answer that question, unless the phrase "the judgment of the Administrator" furnishes the answer.

Now that the Administrator had selected the area for the operation of the law and recommended a stabilization or reduction of rents, the Act decreed that he must wait sixty days before putting his recommendations into effect. He was required to notify no one as to his recommendations. He was required to give no one a hearing. He was required to notify no one as to the **facts** upon which he based his judgment. But, says the law:

"If within sixty days after the issuance of any such recommendation rents for **any** such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, **in accordance with the recommendations**, the Administrator may by regulation or order establish such **maximum rent OR maximum** rents as **in his judgment** will be **generally** fair and **equitable** and will effectuate the purposes of this act."

[Act, Section 2 (b), U. S. C. A., Title 50, App., Section 902 (b)].

(Emphasis ours.)

The only prerequisite to the issuance of the regulation (after the expiration of the sixty-day period) establishing

maximum rents is that rents have not in the judgment of the Administrator been stabilized or reduced in accordance with his recommendations.

His recommendations may have been entirely erroneous. That fact made no difference. Rents may have been stabilized or reduced during the sixty-day period. That fact made no difference. The "standard" is: They must have been reduced in accordance with the Administrator's recommendation; erroneous though it may have been. And he determined whether or not they had been stabilized or reduced in accordance with his recommendation with no standard for the determination. Having so determined, he proceeded to issue the regulation or order. Should he establish a "maximum rent" or "maximum rents" for the area? Should the maximum rent be the same throughout the area or should it vary in different Counties, different Cities, different wards of a City, different streets of a ward, different portions of a street? His unfettered discretion dictated the answer.

What should be the "form and manner" of the establishment of such regulation? What classification and differentiations should it contain? For what adjustments and reasonable exceptions should it provide? What exceptions are reasonable and what unreasonable? Section 2 (c) [U. S. C. A., Title 50; App., Section 902 (c)] furnishes the only answer or standard:

**"Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act."** (Emphasis ours.)

We come to the most vital question. What should be the amount of the rent permitted to be charged? What

should determine the maximum rent for such accommodations so carved out? The Act says merely: "such maximum rent, or maximum rents . . . as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

What does the phrase "generally fair and equitable" mean? What sort of a guide or standard does that phrase furnish? It is preceded by the words "in his judgment." So, the delegation by Congress to the Administrator was to fix a rent in area selected by him which he deemed to be generally fair and equitable.

" . . . the standard, which would prevent the Act from being unconstitutional, is not rents which in the judgment of the Administrator are fair and equitable, but rents shown by ascertained and recorded facts to be fair and equitable" (Judge Deaver's opinion, Tr., page 36).

What legal meaning has the phrase "generally fair and equitable?" The literal meaning of the phrase is: "In the main, just." Therefore, the direction of Congress is that the Administrator fix rents which he deems to be just, in the main. They may be unjust to tenants and just to owners in particular cases. They may be just to tenants and unjust to owners in particular cases. But, that would be perfectly legal and constitutional, appellants contend, just so the rents fixed are "in the main just" the law is satisfied. We confidently assert that this cannot be so under the American system of constitutional government.

What does the word "just" indicate? Fair—but fair from what standpoint? From the standpoint of a fair return on the property? The law does not say so. The law simply says that what the Administrator thinks is "generally fair and equitable" **shall be** generally fair and equitable.

There are **other suggestions** made by the Congress to the Administrator for his consideration in determining whether a rent is generally fair and equitable.

**So far as practicable**, the Administrator shall ascertain and give **due** consideration to the rents prevailing for such accommodations or **comparable** accommodations on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of the Act, then on or about a date [not earlier than April 1, 1940], which **in the judgment of the Administrator** does not reflect such increases).

He shall make adjustments for such relevant factors **as he may determine to be of general applicability** in respect of such accommodations, including property taxes and other costs.

In prescribing regulations and orders establishing maximum rents, he shall, **to such extent as he determines to be practicable**, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area.

Can a broader grant of power to an administrative officer be imagined by the Court than that contained in Sections 2 (b) and 2 (c) of this Act? Stripped of surplusage and legal redundancy, Congress, by this Act, simply granted to an appointed official the right to go anywhere he pleased in the United States, at any time he pleased, and fix such rents as he pleased, as he deemed fair. Congress simply said by this Act that rents of housing accommodations in the United States should be controlled during the war. In what parts of the country such control should become effective, at what times it should become effective, the degree of the control, the manner of the control, all of these elements were left to the unfettered discretion of an administrative official.

We confidently assert that such an Act, such a sweeping delegation of power is violative of Article I, section 1, of the Constitution:

“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

The Congress cannot constitutionally appoint an attorney-in-fact, in its name and stead to legislate on the subject of rent control. That it has attempted to do. The attempt is unconstitutional and void tested by the principles of any case heretofore decided by this Court.

We have previously in this brief adverted to the case of Panama Refining Co. v. Ryan, 293 U. S. 388, 55 Sup. Ct. 241, and referred to the language of this Court at page 421 of the official reports.

The Court, in the Panama Refining Company case, at page 415, prescribed the yardstick by which the constitutional measure of statutes of this nature should be taken. The Court, speaking through Mr. Chief Justice Hughes (Mr. Justice Cardozo dissenting), said:

“Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President’s action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.”

In the Emergency Price Control Act of 1942, in the first section of the Act, the Congress did declare its purposes in broad general terms, and as to rents did say specifically that one of the purposes of the Act was to stabilize them and prevent speculative, unwarranted, and abnormal increases thereof.

As we have pointed out in considerable detail, Congress has not set up a standard for the Administrator’s action.

Congress has not required any legal finding by the Administrator in the exercise of the authority to fix maximum rents.

"In the present case, the Administrator, though contending that findings are not necessary, says he has made findings. That depends, of course, upon his definition of findings. Without reciting all the statements in the rent Declaration and in the Regulation, it is sufficient to say that those documents, in effect, simply declare that in the Administrator's judgment, the basic facts exist and do not contain findings of subsidiary facts such as the Supreme Court has held necessary. If the requirement that the rent fixed shall be what the Administrator thinks is 'fair and equitable' be a standard, his so-called findings simply state that in his judgment they are fair and equitable without containing the intermediate facts which caused him to think so."

Judge Deaver's opinion (Tr. page 35).

"An express finding, if the Administrator were required to make (it) that the prices fixed would effectuate the purposes of the Act, would not be a standard, but a mere statement of opinion. *Schechter Corp. v. United States*, 295 U. S. 495 (8)."

*Ibid*, Tr., page 37.

(The language referred to by Judge Deaver in the *Schechter* case is at page 538 of the opinion in the official reports.)

Findings should be statements of the ultimate facts in the controversy, and not of probative facts or mere conclusions of law.

*Murphy v. Bennet*, 9 Pac. 738, 739, 68 Cal. 528.

Mr. Justice Cardozo dissented from the ruling of the majority in the **Panama Refining Co. case**. But, in the

Schechter, he concurred, and wrote a concurring opinion which commences with language both striking and apt:

"The delegated power of legislation which has found expression in this Code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion—*Panama Refining Co. v. Ryan*, 293 U. S. 388, 440. This Court has held that delegation may be unlawful, though the act to be performed is definite and single, if the necessity, time and occasion of performance have been left in the end to the discretion of the delegate. *Panama Refining Co. v. Ryan*, *supra*. I thought that ruling went too far. I pointed out in an opinion that there had been 'no grant to the Executive of any roving commission to inquire into evils and then, upon discovering them, do anything he pleases'—293 U. S. 388, at page 435. Choice, though within limits, had been given him 'as to the occasion, but none whatever as to the means.' Here, in the case before us, is an attempted delegation not confined to any single act nor to any class or group of acts identified or described by reference to a standard. Here, in effect, is a roving commission to inquire into evils and upon discovery correct them."

295 U. S., at page 551.

In the statute now under consideration, to the Administrator is given choice as to time, place, and manner of execution of the delegated power. He executes the power wherever in his opinion rents have increased contrary to the purposes of the Act; whenever in his judgment such action is necessary, or even proper, to effectuate the purposes of the Act; in such form and manner as in his judgment are necessary or proper to effectuate the purposes of the Act.

"The maxim that a Legislature may not delegate legislative power has some qualification, as in the cre-

ation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. If the latter qualification is made necessary in order that the Legislative power may be effectively exercised. In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State."

Wichita Ry. & Light Co. v. Public Utilities Commission, 260 U. S. 48, 59, 43 Sup. Ct. Rep. 51, 55.

The statute of the State of Kansas there under consideration as set out by the Court in the opinion was:

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates . . . fares . . . and if after full hearing and investigation the Commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminatory, or unduly preferentive, the Commission

shall have power to fix and order substituted therefor such rate or rates . . . as shall be just and reasonable."

It is true that that statute contained the words "shall find" and that the word "find" does not appear in the Emergency Price Control Act. Perhaps the authors of the Act designedly omitted the word. The omission of the specific word "find" creates no distinction. The power conferred upon the Price Administrator becomes operative whenever an area shall be **designated** by him as an area where defense activities have resulted or threatened to result in an increase in rents inconsistent with the purposes of the Act and whenever **in his judgment** his action is proper or necessary to effectuate the purposes of the Act.

The Act, of necessity, implies that that "designation" is a "finding," that the exercise of his judgment shall be based upon a "finding" of necessity or propriety.

In *Carter v. Carter Coal Company*, 298 U. S., at page 332, Mr. Justice Cardozo (in a dissenting opinion) was of the opinion that there had been no excessive delegation of legislative power. But he pointed out that the prices to be fixed by the district boards and the commission must have conformed to the following standard:

- (a) They must have been just and equitable;
- (b) They must have taken account of the weighted average cost of production for each minimum price area;
- (c) They must not have been unduly prejudicial or preferential as between districts or as between producers within a district;
- (d) They must have reflected as nearly as possible the relative market value of the various kinds, qualities and sizes of coal, at points of delivery in each common consuming market area;

(e) The minimum for each district should yield a return net per ton, not less than the weighted average of the total costs per ton of the tonnage of the minimum price area;

(f) The maximum for any mine, if a maximum were fixed, must have yielded a return not less than cost plus a reasonable profit.

All these elements, save the first, are lacking in the statute here assailed.

With respect to the point now being presented, counsel (in the Court below) for the appellant cited the following decisions of this Court:

*Opp Cotton Mills v. Administrator*, 312 U. S. 126;  
*Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381;

*United States v. Rock Royal Co-operative*, 307 U. S. 533;

*New York Central Securities Corp. v. United States*, 287 U. S. 12;

*Chesapeake & Ohio Railway Co. v. United States*, 283 U. S. 35;

*Union Bridge Co. v. United States*, 204 U. S. 364.

In the *Opp Mills* case the Court says that the essentials of legislative function

“are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is effective.”

Opinion, page 145;

Judge Deaver's Opinion (Tr., page 34).

The trial Judge might also have alluded to language of this Court at page 144 of the opinion, the mere quoting of which serves to distinguish that case from this:

“The mandate of the Constitution, that all legislative powers granted ‘shall be vested’ in Congress,

has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, **made in conformity to previously adopted legislative standards or definitions of Congressional policy**, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its **definition** of the circumstances in which its command is to be effective, constitutes the performance, in the constitutional sense, of the legislative function."

"True, the appraisal of facts in the light of the declared policy and **in conformity to prescribed legislative standards**, and the inferences to be drawn by the administrative agency from the facts, so appraised, involve the exercise of judgment within the prescribed limits. But where, as in the present case, **the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute to be kept or which is in fact preserved, are such that Congress, the Courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.**" (Emphasis ours.)

The problem involved in *Sunshine Coal Co. v. Adkins*, supra, was the constitutionality of the Bituminous Coal Act of 1937 (15 U. S. C. A., Sections 828-851), enacted because the labor provisions of the Bituminous Coal Conservation Act of 1935 had been held unconstitutional in *Carter v. Carter Coal Company*, supra. Mr. Justice Douglas, writing for the Court, pointed out that the majority of the Court in the Carter case did not pass on the price-fixing features of the earlier Act. He said:

"The Chief Justice and Mr. Justice Cardozo, in separate minority opinions, expressed the view that the price-fixing features of the earlier act were constitu-

tional. We rest on their conclusions for sustaining the present Act."

Page 397.

We have previously in this brief pointed out the elements designated by Mr. Justice Cardozo as supporting the constitutionality of that Act, elements lacking here, save one of them. At page 397 of the opinion Mr. Justice Douglas repeats those elements which were designated by Mr. Justice Cardozo as sufficient to support the delegation among which are: "No maximum price shall be established for any mine which will not yield a fair return on the fair value of the property."

At page 398 Mr. Justice Douglas calls attention to the fact that the Packers and Stockyards Act (7 U. S. C., Section 211) provided the standard of "just and reasonable" to guide the administrative body in the rate-making process. He said:

"The validity of that standard (*Tagg Brothers & Morehead v. United States*, 280 U. S. 420 . . . make(s) it clear that there is a valid delegation of authority in this case."

As we read *Tagg Brothers & Morehead v. United States*, we do not see that the Act was attacked on the ground of an invalid delegation of legislative power. The constitutional attack seems to have been that if the Act be construed as conferring authority upon the Secretary of Agriculture to prescribe charges, it exceeded the constitutional power of the Federal Government "because it is not a regulation of commerce and violates the Fifth Amendment, because the charges so to be fixed are those for personal services" (280 U. S., at page 434).

By the Packers and Stockyards Act (U. S. C., Vol. 7, Section 211) the Secretary of Agriculture may determine and prescribe what will be "the just and reasonable rate

or charges . . . to be thereafter observed." But as a prerequisite to his determination and prescribing there must have been a "full hearing" upon a complaint made as provided in Section 210, or after "full hearing" upon an order for investigation and hearing made by the Secretary.

That statute was considered by this Court in *Morgan v. United States*, 298 U. S. 468, 56 Sup. Ct. 906, and at page 479 the Court unanimously said:

"What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes? The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding the distinctive character . . . it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory.' If and when he so finds, he may 'determine and prescribe what shall be the just and reasonable rate, or the maximum or minimum rate thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. **There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact.** Nothing can be treated as evidence which is not introduced as such. . . . Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. **Findings based on the evidence must embrace**

**the basic facts which are needed to sustain the order.**

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a **quasi judicial** character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings, in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." (Emphasis ours.)

How utterly different is the statute under consideration, which simply provides for the fixing of rents "generally fair and equitable" without the semblance of a hearing being prescribed by statute, which provides that to assist him in prescribing any regulation under the Act, the Administrator is authorized to make such studies and investigations and to **obtain such information as he deems necessary or proper** [Act, Section 202 (a); 50 U. S. C. A. App., Section 922 (a)].

Mr. Justice Douglas in the Adkins case also stated that the criterion of "public interest" had been upheld in *New York Central Securities Corporation v. United States*, 287 U. S. 12, 24. Sections 5 and 20 (a) of the Interstate Commerce Act were assailed in that case. Appellant insisted "that the delegation of authority to the Commission is invalid because the stated criterion is uncertain." The Court said:

"That criterion is the 'public interest.' It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, **the requirements it imposes**, and the context of the provision in question show the contrary" (page 24 of 287 U. S.). (Emphasis ours.)

What did the Court mean by the emphasized words in the foregoing quotation?

Section 5 (2) of the Interstate Commerce Act commences:

"Whenever the Commission is of opinion, **after hearing upon application of any carrier . . . engaged in the transportation . . . that the acquisition to the extent indicated by the Commission . . . will be in the public interest . . .**" (Emphasis ours.)

The statute involved in *United States v. Chemical Foundation*, 272 U. S. 1, was Section 12 of the Trading with the Enemy Act of 1917, which vested the Alien Property Custodian with the powers of a common law trustee with respect to property of alien enemies taken over by him, and granting to him powers of sale of such property with the following proviso:

"Provided, that any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale, to the highest bidder, after public advertisement of time and place of sale, which shall be where the property or a major portion thereof is situated, **unless the President stating the reasons therefor, in the public interest, shall otherwise determine.**"

After the war, the United States brought suits to set aside sales made by it to the Chemical Foundation.

The following language of the Court (opinion, pages 11-12) is pertinent:

"While not denying the power to confiscate enemy properties, the United States argues that as construed below the provision in question is unconstitutional because it attempts to delegate legislative power to the Executive. But the Act gave the Custodian, acting under the President, full power of disposition. No restriction was put upon disposition other than sales. And sales to the United States were not regulated. The general rule laid down was that all dispositions by sale or otherwise should be made in accordance with the determinations of the President; the proviso made an exception including a class of sales; and upon the failure of the President otherwise to determine stating the reasons therefor in the public interest, it required that such sales should be made as there specified. It was not necessary for Congress to ascertain the facts of or to deal with each case. The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of law; it was the application of the general rule laid down by the Act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power." (Emphasis ours.)

In *Avent v. United States*, 266 U. S. 127, the Court had under consideration Title 4, Section 402 (15) of the Transportation Act of 1920. Allusion as made in *Sunshine Coal Co. v. Adkins* to the criterion of "public interest." The context should be noted. The Transportation Act authorized the Interstate Commerce Commission, whenever it was of the opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action ex-

ists in any section of the country, to suspend its rules as to car service and to make such reasonable rules with regard to it as in the Commission's opinion would best promote the service in the interest of the public and the commerce of the people.

The Court transferred the case to the Circuit Court of Appeals, holding that the case lacked the presence of a substantial question. The criterion seemed to be "the existence of an emergency," for the Court said, "We must take it that an emergency contemplated by the statute existed, as found by the Commission and alleged in the indictment."

In *Union Bridge Co. v. United States*, 204 U. S. 364, the Act under consideration was the River and Harbor Act of March 3rd, 1899.

At page 387, the Court said:

"To this may be added the consideration that Congress, by the Act of 1899, did not invest the Secretary of War with any power in these matters that could reasonably be characterized as arbitrary. He cannot act in reference to ~~any~~ bridge alleged to be an **unreasonable obstruction** to free navigation **without first giving the parties an opportunity to be heard**. He cannot require any bridge of that character to be altered, even for the purpose of rendering navigation through or under it reasonably free, easy, and unobstructed; without giving previous notice to the persons or corporations owning or controlling the bridge, **specifying the changes recommended by the Chief of Engineers**, and allowing a reasonable time in which to make them. If, at the end of such time, the required alterations have not been made, the Secretary is required to bring the matter to the attention of the United States District Attorney, in order that criminal proceedings may be instituted to enforce the Act of Congress. In the present case all the provisions of the statute were complied with. **The parties concerned were duly notified and were fully heard**, nor is there any reason to say

that the Secretary of War was not entirely justified, if not compelled, by the evidence in **finding** that the bridge in question was an unreasonable obstruction to commerce and navigation as now conducted." (Emphasis ours.)

A suit, brought by the Chesapeake and Ohio Ry. Co. against the United States and others, was decided by the Court in 283 U. S. (page 35). The Interstate Commerce Commission appeared as a defendant. The purpose of the suit was to set aside and annul so much of orders and certificates of the Commission as authorized certain railroads to construct and operate a new line of railroad. The certificates attacked were commonly known as certificates of public convenience and necessity.

The Interstate Commerce Act, as amended, forbade a railroad to construct a new line of railroad without first having obtained from the Commission such certificate.

The Act provided that the Commission should "have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion . . . of a line of railroad, or extension thereof described in the application . . . and may attach to the issuance of such certificate such terms and conditions as in its judgment the public convenience and necessity may require." [Section 1 (20).]

We do not find that in the Chesapeake & Ohio case the Company raised any question as to the constitutionality of the Act. The claim was that the Commission had exceeded its authority under the Act. But the Court pointed out:

"There is no specification of the considerations by which the Commission is to be governed in determining whether the public convenience and necessity require the proposed construction. **Under the Act it was the duty of the Commission to find the facts and, in the exercise of a reasonable judgment, to determine that question.** Texas and Pac. Ry. Co. v. Gulf, etc. Ry. Co., 270 U. S. 266, 273."

(Opinion, page 42.)

In *United States v. Rock Royal Co-operative, Inc., et al.*, 307 U. S. 533, the Court considered the constitutionality of the Agricultural Marketing Agreement Act of 1937 (The Rock-Royal case may well be considered along with the case of *H. P. Hood & Sons v. United States*, 307 U. S. 588).

The majority of the Court held the Act attacked in the Rock Royal case to be constitutional, but that ruling can hardly be said to be authority for a contention that the Emergency Price Control Act is constitutional.

That Act distinctly provided:

**"Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in Subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order."**

**"After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this Section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity."** (Emphasis ours.)

The following language of the majority opinion is pertinent:

**"In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable"** (page 574).

We have only to apply that test to the Act here under consideration, and the Act falls.

Is there such an exact standard that an affected property owner can understand the limits of the Administrator's power?

Is "generally fair and equitable" such a standard?

The Court then pointed out that the terms of orders are limited to the specific provisions, minutely set out in Sections 8 (c) (5) and (7) (page 575), and then said:

"The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8 (c) (2) limits him to milk, fish, fruits except apples, tobacco, fresh vegetables, soy beans and naval stores. The act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A City milkshed seems homogeneous. This standard of practicability is a limit on the power to issue orders. It determines when an order may be promulgated" (page 576).

It may be argued that the only "charges" sought to be regulated by Section 2 (b) of our Act were rent charges, and those charges regulated only in a defense rental area. The answer is that while a "City milkshed" may be "homogeneous," and its limits defined by exact proof, a "defense rental area" cannot be so defined. A "defense rental area" under the very terms of the Act is an area designated by the Administrator as an area where defense activities have resulted or threatened to result in an increase in rents inconsistent with the purposes of the Act.

The Court further said: "It is further to be observed that the Order could not be and was not issued until after the hearings and findings as required by Section 8 (c) (4) . . . even though procedural safeguards cannot

validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority" (page 576).

As to the fixing of prices, the Court said:

"The Secretary must have first determined the prices in accordance with Section 2 and Section 8 (e), that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. That price cannot be determined by mathematical formula, but the standards give ample indications of the various factors to be considered by the Secretary."

How different is our standard of whatever rent in the judgment of the Administrator may be "generally fair and equitable."

Mr. Justice Roberts' dissent in the Hood case (307 U. S. 603) was intended also as an expression of his views in the Rock Royal case (307 U. S. 583). He said:

"Valid delegation is limited to the execution of a law. If power is delegated to make a law, or to refrain from making it, or to determine what the law shall command or prohibit, the delegation ignores and transgresses the constitutional division of power between the Legislature and the Executive branches of the government. In my view the Act vests in the Secretary authority to determine, first, what of a number of enumerated commodities shall be regulated; second, in what areas the commodity shall be regulated; third, the period of the regulation, and, fourth, the character of regulation to be imposed; and for those reasons, cannot be sustained. The statute is

an attempted delegation to an executive officer of authority to impose regulations within supposed limits and according to supposed standards so vague as in effect to invest him with uncontrolled power of legislation. Congress has not directed that the marketing of milk shall be regulated. Congress has not directed that the regulation shall be imposed throughout the United States or in any specified portion thereof. It has left the choice of both locations and areas to the Secretary. Congress has not provided that regulation anywhere shall become effective at any specified date, or remain effective for any specified period. Congress has permitted such a variety of forms of regulations as to invest the Secretary with a choice of discrete systems each having the characteristics of an independent and complete statute."

Every count of that indictment applies to the Emergency Price Control Act, except the first. Congress did limit the power of the Administrator to the control of rentals of housing accommodations. As we read the Rock Royal case and the Hood case, the majority of the Court differed with the views of Mr. Justice Roberts, principally because the majority, speaking through Mr. Justice Reed, were of the opinion: (first) that standards had been prescribed by Congress with sufficient exactness to enable those affected to understand the limits of the powers delegated, and (secondly) that the procedural safeguards provided by that Act furnished protection against an arbitrary use of properly delegated authority.

Both elements of distinction are lacking in our case. We have neither standards nor procedural safeguards.

"Where delegation has been sustained the Court has been careful to point out the circumstances which made it possible to prescribe a standard by which administrative action was confined and directed."

(Hood case, *supra*, at page 608, Mr. Justice Roberts' dissent.)

In *Mulford v. Smith*, 307 U. S. 38, the Court considered the Agricultural Adjustment Act of 1938 as it affected the tobacco crop of 1938.

Those asserting the invalidity of the Act urged that the standard for allotting farm quotas was so indefinite, vague, and uncertain as to amount to a delegation of legislative power to an executive officer and thus violated the constitutional requirement that laws should be enacted by the Congress.

Mr. Justice Roberts, speaking for the Court, said:

"What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota, and, second, in its allotment amongst States and farms. He is directed to adjust the allotments so as to allow for **specified factors** which have abnormally affected the production of the State or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. **The Congress has indicated in detail** the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action has afforded **both administrative and judicial review** to correct errors. This is not to confer unrestrained arbitrary powers on an executive officer. In this aspect the Act is valid within the decisions of this Court respecting delegation to administrative officers" (pages 48, 49). (Emphasis ours.)

The directions given by Congress in detail are set out at page 43 of the opinion.

[It is interesting to note that Judge Deaver was one of the members of the Statutory Three-Judge Court which held this Act valid (24 Fed. Supp. 919).]

At this juncture it might be well to consider the nature of the "administrative and judicial review" afforded by the Emergency Price Control Act.

There is absolutely no provision for a review of the designation by the Administrator of an area as a "defense rental area." There is no appeal or review provided by which his action in issuing a declaration or recommendation can be corrected, if erroneous. A property owner is permitted to file a "protest" only after a regulation or order has been issued by the Administrator, and he may file that protest only if he is subject to a provision of the order or regulation. It must be filed in accordance with regulations prescribed by the Administrator. The reviewing authority is the same as the issuing authority. A proceeding may be limited by the Administrator to the filing of affidavits, or other written evidence and the filing of briefs. The Administrator, in his consideration of the protest, may take official notice of economic data and "other facts." Within thirty days after the filing of the protest the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. He is not compelled by law to grant or deny it within any specified time. Until he does deny it the doors of the Courts are closed to the protestant. If and when the protest is denied by the Administrator, the protestant may file a complaint (which is really an appeal) with the Emergency Court of Appeals created by the Act. No evidence, other than that presented to the Administrator, will be considered by the Court unless it grants leave to submit such additional evidence. The protestant has no right to examine the Administrator or cross-examine those from whom he may have received "economic data." The Emergency Court has no right to set aside a regulation or order, in whole or in part, unless the complainant establishes that it is not in accordance with law or is arbitrary and capricious.

Even if the Emergency Court so finds, the effectiveness of its judgment is postponed until the expiration of thirty

days from the entry thereof, but if within that thirty-day period the Administrator files a petition for certiorari with the Supreme Court, the effectiveness of the judgment is postponed until final disposition of the case by the Supreme Court.

**The Rent Control Sections of the Emergency Price Control Act Are Unconstitutional and Void, Being Violative of the Fifth Amendment to the Constitution of the United States.**

"No person shall be . . . deprived of life, liberty, or property without due process of law."

Constitution of the United States, Amendment V.

This point of law has two aspects:

(a) There is no provision in the Act for a hearing before the order or regulation fixing rents becomes effective;

(b) The language of the Act permitting the Administrator to fix rents in a given area which in his judgment are **generally** fair and equitable permits him to fix an unfair and inequitable rent as to particular property, thus depriving that property owner of his right to a reasonable return on the value of his property.

The former of these two aspects rests upon this principle:

"The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective."

Opp Cotton Mills v. Administrator, 312 U. S. 126,  
at pages 152-3.

As we have previously stated, Section 2 (b) of the Act commences:

**"Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of the Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense rental area."**

The prime movement in the effectuation of the Act is a designation by the Administrator of an area where defense activities have resulted or threatened to result in an increase in rents for housing accommodations inconsistent with the purposes of the Act.

The Act does not require that he give property owners of the affected area any notice of his intention to designate their area, nor any opportunity to be heard on the question of whether or not, in fact, defense activities have resulted or threatened to result in abnormal, unwarranted and speculative increases. If, in the opinion of the Administrator, defense activities have resulted in the prohibited increases, or threaten so to do, the designation is made without further ado.

Having made the designation, or contemporaneously therewith, he issues a declaration and recommendation.

The Act does not require that he give to the property owners of the designated area any notice of this declaration, nor of the alleged necessity nor of the recommendations with respect to stabilization or reduction of rents in the area. Nor do they have an opportunity to be heard with respect to his ideas of necessity of reduction and his recommendations.

Then the Act provides:

**"If within sixty days after the issuance of any such recommendations rents for such accommodations**

within such defense rental area have not in the judgment of the Administrator been stabilized by State or local regulation or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act."

The property owners of the affected area are not required to be given notice, nor have they an opportunity to be heard on the vital element contained in the sentence last quoted:

(a) Have the rents been stabilized or reduced in accordance with the Administrator's recommendations?

(b) Are the rents fixed by his regulation generally fair and equitable and effectuate of the purposes of the Act?

The judgment of the Administrator is the last word before the regulation becomes effective. Immediately it has the force of law. Those property owners, who have had no notice, no opportunity to be heard, must conform to the regulation, or be subject to heavy civil and criminal penalties.

True it is, that **after** the issuance of a regulation, a person affected thereby may file a protest and, in the event of a denial of it, file a protest with the Emergency Court.

But in the meantime the regulation remains effective. There is no provision in the law for a stay of the regulation pending the protest or the complaint in the Emergency Court.

Under previous decisions of this Court, the effect of such a drastic procedure is to deprive property owners of their property without due process of law, and the Act is unconstitutional.

The case of Charles W. Wilson and Emma Bennett v. Price Administrator (decided by the Emergency Court of Appeals July 15, 1943, 137 Fed. [2d] 348), expresses the view of that Court that the effect of a rent regulation issued under this Act is not to "take" property in the constitutional sense.

We suggest that that view is contrary to the ruling of this Court in *Tyson & Bro. etc. v. Banton*, 273 U. S. 418, 47 Sup. Ct. 426, in which the Court held that the owner of property has the right to fix a price at which it should be sold or used, which right is within the protection of the equal protection and due process clauses of Constitutional Amendments 5 and 14.

This right is somewhat protected as to prices on commodities under Section 2 (a) of the Act, but there is absolutely no such protection as to property owners with respect to the fixing of rents under Section 2 (6) of the Act.

We have pointed out that the Court said in the *Opp Cotton Mills* case, *supra*, that due process demands a hearing at some point in an administrative proceeding before the final order becomes effective.

The final order is the rent regulation. In this area it became effective July 1, 1942, and has remained effective almost a year and a half. No provision is there in the law which permitted property owners to stay the regulation pending any protest which they may have filed with the Administrator and any subsequent appeal therefrom to the Emergency Court. On the contrary, the Act expressly forbids such a stay.

*Morgan et al. v. United States*, *supra*, should be considered also with respect to this phase of our case. You said there, at pages 14 and 15,

"(that this question) goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legis-

lature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action, and that **in administrative proceedings of a quasi judicial character** the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard,' "

citing *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 73; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U. S. 292; *California Railroad Commission v. Pacific Gas and Electric Company*, 302 U. S. 388; *Morgan v. United States*, 298 U. S. 468. (Emphasis ours.)

The Court held that the hearing held was fatally defective and the order of the Secretary invalid (Opinion, page 22). In so holding the Court handed down an opinion, some of which of the language is apt here, e. g.:

"In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion if he gave the hearing which the law required. The Secretary read the summary presented by appellants' brief and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a 'full hearing'—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet

them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellant. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellant's rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument."

(Opinion, pages 18 and 19.)

"The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects the Government, acting through the Bureau of Animal Industry of the Department, was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies were put in jeopardy. Upon the rates for their services the own-

ers depended for their livelihood and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services, and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding, *Tagg Bros. & Morehead v. United States*, 280 U. S. 420, 50 S. Ct. 220, 74 L. Ed. 524; *Acker v. United States*, 298 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257, places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry."

(Opinion, pages 20-21.) (Emphasis ours.)

At page 22 of the official reports the Court said:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In *Porter v. Investors Syndicate*, 286 U. S. 461, 52 Sup. Ct. Rep. 617, the Court had under consideration the promulgation by the Investment Commissioner of the State of Montana of a rule governing the appellee's business, and his intention to revoke appellee's permit if it failed to obey the rule. The appellee had brought an action in a specially constituted District Court to enjoin the enforcement of the order and to enjoin the appellant from revoking its permit for failure to comply with the order. The District Court granted the injunction, holding that the challenged statute was violative of the due process clause as lacking any provision for a notice or hearing before the revocation of the license and for other reasons.

While the Supreme Court reversed, its reasons for reversing are both pertinent and potent here. The Court said (at page 468):

**"We are of the opinion that the appellee failed to exhaust its administrative remedy before applying to the District Court for injunctive relief. The granting and revocation of permits is an exercise by the appellant of delegated legislative power."** (Emphasis ours.)

The statute of the State of Montana under which the Commissioner was proceeding provided that any interested person dissatisfied with an order of the Commissioner might bring an action against him in the State Court to vacate his order and set it aside as unjust or unreasonable. The Supreme Court said that the function of the State Court under this statute was not solely judicial, the duty being laid on the Court to examine the evidence presented and either to set aside, modify, or affirm the order as the proofs may require. "The legislative process," said the Supreme Court, "remains in-

complete until the action of that Court (the State Court) shall have become final" (Opinion, page 468).

The Supreme Court held the Act constitutional.

Why?

Because it construed the Act to provide that the appellee in his action in the State Court, attacking the decision of the Commissioner, might, upon a proper showing, have obtained a stay of its operation (Opinion, page 468).

And finally the Supreme Court laid down the doctrine which governs our case:

"Where, as ancillary to the review and correction of administrative action, the State statute provides that the complaining party may have a stay until final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner. . . . But where either the plain provisions of the statute . . . or the decision of the State Court interpreting the Act preclude a supersedeas or stay until the legislative process is completed by the final action of the reviewing Court, due process is not afforded. . . ." (Opinion, pages 470, 471).

Under the Emergency Price Control Act, when the Administrator issues a designation or recommendation, there is no provision for an appeal to him or to any Court. When he issues the regulation, any person subject to its provisions may file a protest with him and have a hearing of a sort, and upon denial of his protest may file an appeal or complaint to the Emergency Court. But there is no provision for a stay of the regulation. It remains effective. It remains effective, as we have pointed out, until the Supreme Court shall have passed on it or had the opportunity to pass on it. Therefore, how can you do other but apply the last sentence of the last quotation: When the plain provisions of the statute preclude a supersedeas or stay, due process is not afforded?

In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 57 Sup. Ct. 724, the Supreme Court says:

“Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from Courts when it has been reached with due submission to constitutional restraints. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard’ of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of ‘the rudiments of fair play’ assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored” (Opinion, pages 304, 305).

There may be a question raised as to whether the right to notice and hearing exists in a case where the Administrator is exercising a legislative power and not a judicial power.

In the first place, we say that the Administrator, under this Act, may not be exercising a mere administrative or even a legislative power.

Official action the result of judgment or discretion is a judicial act.

*Grider v. Tally*, 77 Ala. 422;

*Merlette v. State*, 100 Ala. 42;

*People v. Jerome*, 73 N. Y. S. 306.

An act is judicial when it requires the exercise of judgment or discretion by one or more persons, or by a corpo-

rate body when acting as public officers in an official character in a manner which seems to them just and equitable.

State v. Briede, 41 So. 487, 489, 117 La. 183.

When he applies the language of the Act to the circumstances existing in a particular area and designates that area as a defense rental area, he is acting judicially. Whenever he adjudges that it is necessary or proper in order to effectuate the purposes of this Act, and issues a declaration setting forth the necessity for and recommendations with reference to the stabilization or reduction of rents within a particular dense rental area, he is not acting legislatively, but judicially. When he adjudges that rents for housing accommodations within a defense rental area have not been stabilized or reduced in accordance with his recommendations, he is acting judicially. When he establishes "such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act," he is acting judicially.

But it makes no difference what adverb we use—"legislatively" or "judicially." The proceeding in *Porter v. Investors Syndicate*, supra, was purely legislative.

In *Corpus Juris Secundum* (Vol. 16, page 1263 et seq.) the rule is thus announced:

"The right to notice and hearing in an administrative proceeding depends on the character of the proceeding and the circumstances involved, and **ordinarily** in the case of administrative or legislative functions due process does not require the notice essential in judicial proceedings. . . . However, property cannot be taken under order of an official or board without notice, since the due process clause extends its protection to such a taking of property, and in some proceedings of an administrative character notice and an opportunity for a hearing are essential to due process.

Where boards or commissioners act in a judicial or quasi-judicial capacity, notice is necessary to render their orders due process, and the law authorizing proceedings must require notice or it will be unconstitutional." (Emphasis ours.)

In support of the emphasized portion of the foregoing quotation, the text cites *Morgan v. U. S.*, *supra*; *Investors Syndicate v. Porter*, *supra*.

We realize quite well that it would be a far-reaching decision for your Honors to hold that the attacked sections are unconstitutional. But it would in no sense be disastrous. Congress can amend this law and render it constitutional. We can observe the Constitution contemporaneously with winning the war.

We end this phase of our brief with a quotation from an opinion of a late Chief Justice of Georgia, long deceased, but still venerated by every Georgia lawyer:

"When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a Supreme Court, supreme in the majesty of duty as well as in the majesty of power, is not *stare decisis*, but *fiat justitia, ruat caelum*."

*Ellison v. Ry. Co.*, 87 Ga. 691, 696.

We pass to the second phase of this point.

Does a statute which permits an Administrator to fix rents which are generally fair and equitable in an area selected by him afford due process to the owner of a particular parcel of property, no provision being made for the setting of a fair and equitable rent as to a particular parcel?

In *Block v. Hirsh*, 256 U. S. 135, the Court (four Justices, including the Chief Justice, dissenting) held that the Act of October 22, 1919 (41 Stat. 297), was constitutional.

That Act created a Commission with power, upon notice and hearing to determine whether the rent, service, and other terms and conditions of the use and occupancy of apartments, hotels and other rental property in the District of Columbia, were fair and reasonable, and, if found otherwise, to fix fair and reasonable rents, in lieu.

The Court took pains to say: "Machinery is provided to secure to the landlord a reasonable rent. Section 106."

Here, no machinery is provided to secure to a particular landlord a reasonable rent.

In the same case, at page 158, the Court said:

"While the Act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the Courts are given the last word."

By this Act an owner of a particular parcel of property is not permitted to raise the question as to whether or not the rent fixed by the general regulation is fair and reasonable as to a particular parcel of property. Therefore, the issue cannot be presented to a Court except as it is presented here in an attack upon the Act.

In *Edgar A. Levy Lessing Co. v. Siegel*, 258 U. S. 242; the New York Emergency Housing Laws held constitutional, prohibited the collection of an unreasonable rent. Therefore the question of whether a rent for a particular parcel was reasonable or unreasonable could be judicially determined.

The principle is well settled that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth Amendment.

*Old Dearborn Distributing Co. v. Seagram Distillers Corporation*, 299 U. S. 183, 192.

Is the right of the owner to fix the price at which he will let it or permits its use by another, any the less an inherent attribute of the property?

In *Wilson v. Brown, Admr., supra*, the Emergency Court of Appeals dealt with this very question, stating the question thus:

"The question remains whether the Act is constitutional in authorizing the Administrator, as it undoubtedly does, to prescribe maximum rents which, while generally fair and equitable, may in individual cases prevent a landlord from earning a fair return on the basis of the fair market value of his rental property."

The Court held the Act valid as against this attack. With all respect to the Emergency Court, its reasoning in so holding does not seem cogent. They said:

"Furthermore, individualized treatment which may be feasible and workable in a regulation application to the District of Columbia may not be necessarily appropriate in a war-time price and rent control program on a national scale."

Is feasibility to be a test of constitutionality?

The Court further ruled inapplicable the doctrine of Public Utility rate cases, as we read the case, on the basis that this is but a temporary measure. They said:

"The useful life of housing accommodations extends far beyond the contemplated period of rent control. There is, in fact, no appropriation of the housing accommodations at all, and so far as there is a narrow restriction on their use, it is for a very limited period."

The "narrow restriction"—the lowering of rents—has been in effect eighteen months and who can tell how long it will remain in effect if this high Court deems it to be valid?

• They said: "Furthermore, the Act does not require the landlord to continue his property in the market for housing accommodations."

If he removes it from the market, and allows it to remain vacant, he is even the more deprived of his property, of a fair and reasonable return on it. A property owner can live in but one home. Property adapted to residential purposes is not usually suitable for any other purpose.

The Emergency Court referred to the concurring opinion of Justices Black, Douglas and Murphy, in *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 602, as questioning the analogy between fair value upon fair return in rate regulation and the requirement of just compensation in the taking of property by eminent domain.

We are not confronted with the question of how a reasonable rent on a particular parcel of property is to be computed.

The question is that the Act lays down a "standard" of a rent "generally fair and equitable" and does not permit a property owner a fair and reasonable and equitable rent on **his** property.

The question resolves into this: If the fixing of an unreasonable rent on a parcel of property is a taking of that property within the meaning of the Fifth Amendment, the Act is unconstitutional with respect to this phase of the attack upon it.

**Even If the Act Should Be Held to Be Valid, Section 5 (c) of Maximum Rent Regulation Number 26 Is Unconstitutional and Void.**

**The Proposed Orders of the Rent Director Would Have Been Unconstitutional and Void, but Appellee (Mrs. Willingham), Would Have Been Forced to Obey Them.**

Section 5 (c) of the Regulation is:

"The Administrator, at any time on his own initiative, or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

"(1) The maximum rent for housing accommodations under paragraphs (c), (d), or (g) of Section 4 is higher than the rent generally prevailing in the defense rental area for comparable housing accommodations on April 1, 1941 . . ." (Tr., page 11).

Paragraph (c) of Section 4 of the Regulation provided that the maximum rent "for housing accommodations not rented on April 1, 1941, nor during the two months ending on that date, but rented prior to the effective date of this Maximum Rent Regulation, the first rent for such accommodations after April 1, 1941. The Administrator may order a decrease in the maximum rent as provided in Section 5 (c)" (Tr., page 11).

The applicable portions of Section 4 (d) of the regulation are: "(For) housing accommodations changed between those dates (April 1, 1941, and July 1, 1942) so as to result in an "increase or decrease of the number of dwelling units in such housing accommodations . . . the first rent for such accommodations after such construction or change; . . . the Administrator may order a decrease in the maximum rent as provided in Section 5 (c)." (Parenthesis supplied.)

Section 13 (a) (2) of the regulation provides that when used in the Rent Regulation: "The term 'Administrator'

means the Price Administrator of the Office of Price Administration, or the Rent Director or such other person as the Administrator may appoint or designate to carry out any of the duties delegated to him by the Act.

(7 Fed. Reg., page 4909, Section 1388.1713);  
(Tr., page 14).

Section 13 (a) (3) of the regulation provides: "The term 'Rent Director' means the person designated by the Administrator as Director of the Defense-Rental Area, or such person or persons as may be designated to carry out any of the duties delegated to the Rent Director by the Administrator" (Ibid).

Mrs. Willingham purchased certain property in Macon in May, 1941, which were changed between April 1, 1941 (the general maximum rent date in the area), and July 1, 1942 (the effective date of the regulation), so as to result in an increase of the dwelling units in the housing accommodations. The permitted maximum rents for the three dwelling units (the "first rent for such accommodations after such . . . change") aggregated \$137.50. These permitted maximum rents were, however, subject to be decreased by an order of the Rent Director on his own initiative under the provisions of Section 5 (c) [and Sections 13 (a) (2) and 13 (a) (3)].

In June, 1943, the Rent Director, on his own initiative, notified Mrs. Willingham of his intention to decrease the rentals on these three units to an aggregate of \$90.00. Had he not been restrained by the restraining order of the Superior Court of Bibb County, he would have issued the order reducing the rents. Mrs. Willingham would have had to comply with the order or be subjected to criminal penalties under Section 205 (b) of the Act and penalty suits under Section 205 (e). The former provides for a fine of not more than \$5,000.00, or to imprisonment for not

more than two years. The latter provides for a penalty of \$50.00 for each violation of an order of the Administrator.

In the bill in the State Court Mrs. Willingham attacked Section 5 (c) of the Regulation as unconstitutional and void, for that:

(1) It would deprive her of her property without due process of law;

(2) It seeks to delegate to the Administrator and his agents legislative and judicial powers in violation of the Federal Constitution;

(3) It is too vague and indefinite to be capable of enforcement according to the law of the land having in it no criterion or rules by which the Administrator and his agents are to be guided in orders decreasing maximum rent otherwise allowable, the phrase "the rent generally prevailing in the defense-rental area for comparable housing accommodations on April 1, 1941," being vague, indefinite, and meaningless in the eyes of the law.

(Tr., pages 13, 14.)

These grounds of attack were repeated by Mrs. Willingham in her defenses in the Federal Court.

(Tr., pages 17-18, 23.)

What has heretofore been said in this brief with respect to the delegation of legislative power by Congress to the Administrator applies with even greater force to the sub-delegation to the Rent Director. The authorities there applicable are, a fortiori, here applicable.

What has heretofore been said with respect to "due process" applies with even greater force to the assailed portions of the regulation.

The Act, if **constitutional**, empowered the Administrator to fix a maximum rent date of April 1, 1941, in this area.

The Act, if constitutional, empowered the Administrator in his regulation fixing the maximum rent date to provide for such classifications and differentiations, adjustments and reasonable exceptions as might seem necessary or proper in his judgment.

Therefore, the Administrator had the right, if the Act is constitutional, to make provision for housing accommodations which were not rented on April 1, 1941, or which were substantially altered thereafter.

The Administrator is authorized under the Act to appoint such employees as he deems necessary in order to carry out his functions under the Act. He may utilize and establish such regional, local, or other agencies as may from time to time be needed [Act, Section 201.(a)].

The Administrator has not been authorized by the Congress to delegate his powers as he sought to do when he defined the term "Administrator" to include a "Rent Director" appointed by him. The "Administrator" is, at least, known to Congress. Congress made provision for his appointment. But, the "Rent Director" is unknown to Congress. He is the creature of the Administrator. The Administrator, in the regulation, did not stop with delegating. He "legislated." He "enacted" that the Rent Director might on his own initiative order a decrease of the maximum rent otherwise allowable, if rents, in cases such as the present, were higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941. Even if the Administrator had been authorized by the Congress by constitutional legislation to delegate and to legislate, in so doing he, too, must prescribe legal standards and afford due process to a property owner.

The Rent Director is authorized to reduce rents (in certain circumstances) when the maximum rent is higher than the rent generally prevailing in the Defense-Rental

Area for comparable housing accommodations on April 1, 1941. Here, again, is an unfettered delegation. Here, again, is a roving commission to seek out evils and correct them. It is nothing more nor less than an authorization to the Rent Director to do what he pleases as to the rents of housing accommodations under the circumstances here presented. True, he must be of the opinion that the rents he seeks to reduce are higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on April 1, 1941.

What does the phrase "generally prevailing" mean? Does it mean "market rental value" or does it mean the rent for a majority of like houses? If it means the latter, should the Rent Director take into account the fact that rents for a majority of like houses on April 1, 1941, might have been fixed by leases executed in the summer of 1940, a time when "defense activities had not resulted in increases in rents for such housing accommodations inconsistent with the purposes of the Emergency Price Control Act of 1942"? (Preamble to Regulation 26; Fed. Reg., Vol. 7, page 4905.)

Shall the rents of houses in rural districts of the Area be considered in determining "general prevailing rent"?

Shall allowance be made for normal, warranted, unspeculative increases between the summer of 1940 and April 1, 1941?

If so, what allowance?

What is meant by the phrase "comparable housing accommodations"? Comparable in what respect. As to size and construction and conveniences only, or shall the neighborhood in which they are located be considered?

No standards are laid down for his determination of these questions. They demonstrate what a tangled web we weave when we depart from constitutional mandates.

"Feasibility" is no answer. "Practicability" is no answer. The Constitution provides that a person shall

not be deprived of his property without due process of law. Due process is not afforded when a "Rent Director" is permitted to interfere with valid contracts of rental through the instrumentality of such a provision as the one here attacked.

The Rent Director need await no complaint of a tenant. There was none in this case. He proceeded on his own initiative. True, he gave notice to the owner of his intentions. But he need not have, under the regulation. And, for that reason, too, the provision of the regulation falls. It provides for no notice to the landlord. No hearing is afforded to him by the regulation. Such notice and hearing as he may have had were the results of grace and not of right. This does not constitute due process.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. Holly, 176 U. S. 398, 409.

"The law itself must save the parties' rights, and not leave them to the discretion of the Courts as such."

Louisville & Nashville R. Co. v. Stockyards Co.,  
212 U. S. 132, 144.

This portion of the Regulation, and those portions of the Act which may be relied on to justify it, also offend another provision of the Constitution: Article III, Section 1. The judicial power of the United States is supposed to be vested in the Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.

Judicial power cannot constitutionally be vested in a Rent Director appointed by an Administrator appointed by the President.

The power vested in the Rent Director by Section 5 (c) of the Regulation is both legislative and judicial. He makes a rule and then enforces it by order or judgment.

The landlord must obey that order or subject himself to criminal and civil penalties.

Revenue Act of 1926, Section 280, authorizing the Commissioner of Internal Revenue to assess and collect the liability at law or in equity of a transferee of property of a taxpayer in respect of the tax imposed on taxpayers, held a denial of due process of law, in violation of Constitutional Amendment V, and an attempt to vest judicial power in the Commissioner of Internal Revenue, in violation of the Constitution, Article III, Section 1.

Owensboro Ditcher & Grader Co. v. Lucas, 18 Fed. (2d) 798 (1);

Mid-Continent Petroleum Corp. v. Alexander, 35 Fed. (2d) 43 (1).

We are not unmindful of Oceanic Navigation Co. v. Stranahan, 214 U. S. 320, 338, and the cases cited therein. The rule of those cases is;

It is within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

Here Congress has not imposed the obligations. The obligations are imposed by the Rent Director when he adjudicates first that a rent is too high, and, second, what a proper rent shall be.

Such an order passed by the Rent Director could not, under the terms of Section 204 (d), be assailed by any Court except the Emergency Court of Appeals after the filing and denial of a protest in the manner hereinbefore considered.

We do most respectfully submit that the order of the trial Judge, holding the regulation invalid, was justified and legally correct.

**By Reason of the Provisions of Section 265 of the Judicial Code (U. S. C. A., Title 28, Section 379), the District Court of the United States for the Middle District of Georgia Had No Jurisdiction to Grant the Writ of Injunction to Stay the Proceeding Filed by Appellee, Mrs. Willingham, in the Superior Court of Bibb County, Georgia.**

“The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.”

U. S. C. A., Title 28, Section 379.

It may seem that this point is illogically placed in this brief—that it should have been the first point stated and argued. It was the first special point made in the motion to dismiss in the Court below. There we asserted:

“An injunction should not be granted in this cause for the reason that such grant would be violative of Section 265 of the Judicial Code (United States Code Annotated, Title 28, Section 378)” (Tr., page 17).

The Court below (and we) were confronted with two decisions of Circuit Courts of Appeals, *Henderson, Administrator, v. Fleckinger et al.*, 136 Fed. (2d) 381, and *Brown, Administrator, v. Wright et al.*, 137 Fed. (2d) 484.

In the *Fleckinger* case (a decision of the Fifth Circuit Court of Appeals) the third headnote is:

“Provision of Judicial Code forbidding the grant of an injunction by Court of United States to stay proceedings in State Court is modified by later provision of Emergency Price Control Act, authorizing Price Administrator to make application to appropriate Court for order enjoining acts constituting violation of the Act.”

At page 382 of the opinion, Judge Sibley, speaking for the Court, said:

"Section 265 of the Judicial Code, forbidding the grant of an injunction by a Court of the United States to stay proceedings in a State Court, must be considered as modified by the later provisions of Section 205 (a) of the Emergency Price Control Act. This latter Act formulated important Federal policies, and charged the Administrator with executing them, and armed him with injunction as his main weapon. We do not think it was intended that his use of it is to be denied because a proceeding in a State Court is contravening the Federal policies. The Federal Act, **assuming its constitutionality**, is a part of the supreme law of the land, and the Courts ought to carry it out fully, using the injunctive process it prescribes. We think this case, though not appearing to be in its circumstances a flagrant violation of the Act, if a violation at all, ought to be tried on its merits." (Emphasis ours.)

Judge Parker, speaking for the Court (Judge Northcutt dissenting), in *Brown v. Wright*, supra, while developing the issue more fully, reached the same conclusion. He concluded:

"In any event, the provision of the Emergency Price Control Act should be construed as modifying or creating an exception to the general provisions of the statute."

The provisions of the Act mentioned by both Courts are those of Section 205 (U. S. C. A., Title 50, App., Section 925).

Section 205 (a) provides:

"Whenever in the judgment of the Administrator any person has engaged or is about to engage in any **acts or practices which constitute or will constitute** a violation of any provision of Section 4 of this Act

(Section 904 of this Appendix), he may make application to **the appropriate Court** for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." (Emphasis ours.)

It will be noted that this subsection uses the expression "the appropriate Court."

Section 205 (c) [U. S. C. A., Title 50, App., Section 925 (C)] provides that the District Courts shall have jurisdiction, concurrently with State and Territorial Courts, of proceedings under the section. (District Courts have exclusive jurisdiction of criminal proceedings.)

Section 4 of the Act (U. S. C. A., Title 50, App., Section 904) in subsection (a) thereof makes it unlawful for any person to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of a regulation or order issued under Section 2 of the Act (Ibid., Section 902). (There are other provisions not applicable here.)

We contend:

First: The provisions of Section 205 (a) of the Act do not modify or create an exception to the provisions of Section 265 of the Judicial Code;

Second: Even if those provisions do so modify or create an exception to the provisions of Section 265 of the Judicial Code, they create such an exception only in a case where the litigant in the State Court was engaging in acts or practices condemned by Section 4 of the Act; and not in a case where the litigant in the State Court was proceeding to enjoin the Rent Director from interfering with her contractual relationship with her tenants, by virtue of an Act of Congress assailed as unconstitutional.

We call attention to the cases of *Toucey v. New York Life Ins. Co.*, and *Phoenix Finance Corporation v. Iowa-Wisconsin Bridge Co.*, 314 U. S. 118, decided November 17, 1941, amended on denial of rehearing December 15, 1941. These opinions were written by Mr. Justice Frankfurter, with Mr. Justice Reed, Mr. Justice Roberts and the Chief Justice dissenting.

The majority opinion pointed out:

(a) Section 265—"a limitation on the power of Federal Courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between State and Federal Courts—is derived from Section 5 of the Act of March 2, 1793" (page 129);

(b) "Regardless of the various influences which shaped the enactment of Section 5 of the Act of March 2, 1793, the purpose and direction underlying the provision is manifest from its terms: proceedings in the State Courts should be free from interference by Federal injunction. The provision expressed on its face the duty of 'hands off' by the Federal Courts in the use of injunction to stay litigation in a State Court" (page 132).

(c) "The language of the Act of 1793 was unqualified: . . . nor shall a writ of injunction be granted to stay proceedings in any Court of a State . . ." (page 132).

(d) In the course of one hundred and fifty years Congress has made few withdrawals from this sweeping prohibition:

(1) Bankruptcy proceedings, the only legislative exception which has been incorporated directly into Section 265;

(2) Removal of actions;

(3) Limitation of ship owners' liability;

(4) Interpleader. The Interpleader Act contained a distinct provision, "Notwithstanding any provision in the Judicial Court to the contrary, said (District Court) shall have power to . . . issue an order of injunction against each (claimant) enjoining them from instituting or prosecuting any suit or proceeding in any State Court or in any other Federal Court";

(5) Frazier-Lemke Act (which was a quasi-bankruptcy Act).

The Act of 1851 [Limitation of Ship-owners' Liability (3) supra] provided that after a ship owner transfers his interest in the vessel to a trustee for the benefit of the claimants "all claims and proceedings shall cease." That, too, was a quasi-bankruptcy Act.

Now it is asserted that, in the face of this opinion, about one month later the Congress enacted the Emergency Price Control Act of January 30, 1942, and by Section 205 (a) created an implied exception to the one hundred and fifty year old statute known as Section 265 of the Judicial Code. Should Section 205 (a) be considered as an implied exception to Section 265 of the Judicial Code, when just a few weeks before its enactment, while, no doubt, it was being debated in the halls of Congress, this Court had used this language:

"The provisions of Section 265 have never been the subject of comprehensive legislative re-examination. Even the exceptions referable to legislation have been incidental features of other statutory schemes, such as the Removal and Interpleader Acts. **The explicit and comprehensive policy of the Act of 1793 has been left intact.** . . . Section 265 is not an isolated instance of withholding from the Federal Courts equity powers possessed by Anglo-American Courts. As part of the delicate adjustments required by our federation, Congress has rigorously controlled the

'inferior Courts' in their relation to the Courts of the States. . . . The guiding consideration in the enforcement of the Congressional policy was expressed by Mr. Justice Campbell, in *Taylor v. Carryl*, 20 How. 583: 'The legislation of Congress, in organizing the judicial powers of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision.' We must be scrupulous in our regard for the limits within which Congress has confined the authority of the Courts of its own creation."

So, we assert, in the light of this decision, that Section 205 (a) of the Act does not create an implied exception to Section 265 of the Judicial Code.

If, however, the Court should deem it to be an implied exception, how far does the exception extend?

By the very terms of Section 265 the Administrator may apply to the appropriate Court for an injunctive order only when a person has engaged in or is about to engage in acts or practices which constitute or will constitute violations of Section 4 of the Act, to wit, demanding or receiving any rent for any defense area housing accommodation, or any other act violating a rent order of regulation.

Is the filing of an injunction by a property owner in an honest effort to test the validity of an Act of Congress and actions of Administrators thereunder an "act or practice" condemned by Section 4 of the Act?

If not, then even the "implied exception" will avail the appellant nothing.

**The Provisions of Section 204 (d) of the Emergency Price Control Act, Purporting to Divest the Superior Court of Bibb County, Georgia, of Jurisdiction and Power to Consider the Validity of a Rent Regulation or to Stay, Restrain, Enjoin or Set Aside Any Provision of the Act or Any Regulation or Order Issued Thereunder, Are Unconstitutional and Void.**

We assert that the Congress of the United States has no constitutional authority to enact any such provisions as those of Section 204 (d) just stated.

This point was made in the lower Court (Tr., pages 19, 24).

With respect to it the Court below said:

“The Court does not deem it necessary to decide and does not decide whether Section 204 (d) of the Act is unconstitutional in so far as it operates or may operate to restrict the jurisdiction of the Superior Court of Bibb County, Georgia, in the case of *Mrs. Kate C. Willingham v. Andrew J. Lyndon, Rent Director*, No. 7508, October Term, 1943” (Tr., page 39).

We do not know that it will become necessary for this Court to decide that point in this case. We shall discuss it briefly.

In *Stanley W. Taylor v. Brown*, Admr. (E. C. A., No. 10, decided by the Emergency Court of Appeals July 15th, 1943, 137 Fed. [2d] 654), that Court said:

“It is equally clear that Congress may vest exclusive jurisdiction in Federal Courts over causes arising under a Federal statute. *The Moses Taylor*, 71 U. S. (4 Wallace) 411.”

That statement begs the question. [Congress has not by this statute vested exclusive jurisdiction in the Federal

Courts over causes arising under it. By the express terms of Section 205 (c), State Courts are given concurrent jurisdiction with the Federal Courts of all proceedings brought under that section (except criminal proceeding.)] The true rule is that Congress may vest exclusive jurisdiction in Federal Courts over causes arising under a constitutional Federal statute. Congress cannot divest the State Courts of the power to determine whether jurisdiction which once was theirs has been constitutionally taken away. Congress has the authority under the powers delegated to it to deprive State Courts of jurisdiction to entertain any cause of action involving those delegated powers, but Congress has not the right (because of the Tenth Amendment and Supremacy Clause) to deprive the State Courts of the power of deciding whether or not the asserted Congressional power has been constitutionally exercised. The decision of the State Court would, of course, be subject to the final decision of the Supreme Court of the United States (Cf. *Southern Railway Company v. Painter*, 314 U. S. 155, 159-160).

Under Article I, Section 8, paragraph 4, of the Constitution, Congress has the power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies. Under Article III, Section 2, the judicial power of the United States extends to all cases, in law and equity, arising under the Constitution and the laws of the United States. Therefore, clearly, the Congress can constitutionally deprive the State Courts of jurisdiction over these subjects of naturalization and bankruptcy—subjects of Congressional power beyond dispute. That is the rationale of the decision in "*The Moses Taylor*," supra.

But suppose Congress, purportedly acting under the Commerce clause of the Constitution, should enact a Federal Workmen's Compensation Law, and deprive the State

Courts of jurisdiction to entertain any suits based on tort claims of employees against employers, could the Congress deprive the State Court of the power of deciding whether the Act of Congress was within its delegated powers?

The answer, we think, is No—because the State Court would have the right initially to decide whether Congress was acting within its power, **not** when it deprived the State Court of jurisdiction, **but** when it sought to regulate the relationship between employer and employee.

For the sake of example, take the First Employers' Liability Act, which was declared unconstitutional by this Court in *The Employers Liability Cases*, 207 U. S. 463, for the reason that it was addressed to all common carriers engaged in interstate commerce, and imposed a liability upon them in favor of any of their employees, without regard to the nature of the business at the time of the injury. Suppose that Act had conferred exclusive jurisdiction of suits under it to the Federal Courts. Suppose further the widow of an employee killed in the line of his duties with a carrier had sued under the State law as it existed prior to the passage of the Federal Law, and been met with the defense that her rights were regulated by the Federal Act. Would not the State Court have had the right to determine whether the Federal Act was constitutional and validly superseded the State Law?

Suppose Congress under some imagined power should enact a uniform divorce law that State Courts should no longer grant divorces, or consider the validity of the Congressional Act. Could that law possibly deprive the State Courts of jurisdiction to determine its constitutionality if it were plead by a respondent in a divorce action in the State Court?

The answer again is No, and the reason for the answer is the Tenth Amendment to the Constitution **and** the Su-

premacv Clause of the Constitution which provides that  
"This Constitution and the laws of the United States  
which shall be made in pursuance thereof . . . shall be  
the Supreme law of the land."

If Congress enacts a law not in pursuance of the Constitution, it cannot deprive the State Court of the right so to say—subject to the final decision of the Supreme Court of the United States. The Constitution, and not the law, governs. The created cannot make itself superior to the creator.

"The power reserved to the States, under the Constitution (Amendment 10), to provide for the determination of controversies in their Courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution."

Healy v. Ratta, 292 U. S. 263, 270;

Chase National Bank v. Citizens Gas Co., 314 U. S.  
63, 76-77.

## CONCLUSION.

We do not question the right of the Congress to enact a statute controlling rents in time of war.

We do strenuously deny the right of Congress to enact the Statute of January 30, 1942. We do strenuously assert that it is unconstitutional, and that the acts of the Administrator and the Rent Director, complained of in the basic suit here involved, are unconstitutional.

We do earnestly hope that this Court will continue to hold that the Constitution is to be observed and maintained in time of war, as well as in times of peace.

"To preserve the permanent Constitutional liberties of the people is the sworn duty of Courts, and is not

to be compared with some good end which might  
sult from permitting government agencies to exercise  
unauthorized power by regulation because of so  
temporary emergency."

Judge Deaver's Opinion (Tr., page 38).

Respectfully submitted,

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## **APPENDIX.**

### **ILLUSTRATIVE DESIGNATION AND RENT DECLARATION.**

#### **Establishing Defense-Rental Areas and Recommending Maximum Rents.**

#### **Birmingham—Designation of the Birmingham Defense- Rental Area and Rent Declaration Relating to That Area.\***

(Preamble.) The Emergency Price Control Act of 1942 provides that whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of that Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-rental area housing accommodations within a particular defense-rental area; and that if within sixty days after the issuance of such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized, or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of that Act; and

In the judgment of the Administrator, defense activities have resulted in an increase in the rents for housing accommodations in the area described below inconsistent with the purposes of the Emergency Price Control Act of 1942; and

\* Designation No. 3, issued 3-2-42, 7 FR, 1677.

In the judgment of the Administrator, it is necessary and proper in order to effectuate the purposes of said Act to issue this declaration, setting forth the necessity for, and recommendations with reference to, the stabilization and reduction of rents for defense-area housing accommodations within the defense-rental area described below;

Therefore, under the authority vested in the Administrator by said Act, this designation and rent declaration is issued.

**Section 1388.101. Designation.** The following area is designated by the Administrator as an area where defense activities have resulted in an increase in the rents for housing accommodations inconsistent with the purposes of the Emergency Price Control Act of 1942 and shall constitute a defense-rental area to be known as the "Birmingham Defense-Rental Area":

In the State of Alabama, the County of Jefferson in its entirety.

**Section 1388.102. Necessity.** The necessity for the stabilization and reduction of rents for defense-area housing accommodations in said defense-rental area is as follows:

The designated area is and has been the location of war production industries. The increase in employment reflecting the expansion of defense activities and the influx of production workers and their families have resulted in an acute shortage of rental housing accommodations in the local market. The President has found that an acute shortage of housing exists or impends in the Birmingham area under Public No. 849, 76th Congress, 3rd Session (Lanham Act), and Public No. 24, 77th Congress, 1st Session (Title VI, National Housing Act). Birmingham has been placed on the list of Defense Housing Areas in which builders may secure priority ratings on critical materials for residential construction.

Surveys in the Birmingham area have reported low vacancy ratios for rental housing accommodations, indicative of the abnormality of the local market. New construction in this area by private industry and by the Government has not been sufficient to restore a normal rental market for housing accommodations.

Defense activities have resulted in substantial and widespread increases in rents, affecting most of the rental housing accommodations in the Birmingham area. Official governmental surveys of rental change conducted in this area have shown a marked upward movement in the general level of residential rents during the past two years. By reason of these substantial increases the rents prevailing in the Birmingham area are not generally fair and equitable.

Section 1388.103. **Recommendations.** The Administrator has ascertained and given due consideration to the rents prevailing for housing accommodations within the designated areas on or about April 1, 1941. It is his judgment that prior to April 1, 1941, defense activities had not yet resulted in increases in rents for such housing accommodations inconsistent with the purposes of the Act, but did result in such increases commencing on or about that date. The Administrator has considered, so far as practicable, relevant factors deemed by him to be of general applicability, including fluctuations in property taxes and other costs. It is the judgment of the Administrator that the recommendations hereinafter set forth are generally fair and equitable and will effectuate the purposes of the Act.

Recommendations with reference to the stabilization and reduction of rents for defense-area housing accommodations in said defense-rental area are as follows:

(a) Maximum rents for housing accommodations should be:

(1) For housing accommodations rented on April 1, 1941, the rent for such accommodations on that date.

(2) For housing accommodations not rented on April 1, 1941, but rented at any time within the six months ending on that date, the last rent prior to said date.

(3) For housing accommodations not rented on April 1, 1941, nor within the six months ending on that date, the first rent after that date, but in no event more than the rent generally prevailing in the Birmingham Defense-Rental Area for comparable housing accommodations on April 1, 1941.

(b) Provision consistent with the purposes of the Emergency Price Control Act of 1942 should be made for the determination, adjustment, and modification of the maximum rent for the following classifications of housing accommodations, but in principle maximum rents for such housing accommodations should not be greater than the rent for comparable accommodations prevailing in the Birmingham Defense-Rental Area on April 1, 1941:

(1) For housing accommodations completed and first rented after April 1, 1941, or changed after April 1, 1941, in any manner resulting in an increase or decrease in the number of units in such accommodations, or substantially altered by an improvement or deterioration subsequent to April 1, 1941.

(2) For housing accommodations owned by the United States or any agency thereof or by the State of Alabama or any political subdivision thereof, or agency of any of the foregoing.

(3) For substantial increase or decrease of services in connection with housing accommodations subsequent to April 1, 1941.

(4) In cases where the rent on April 1, 1941, was materially affected by the blood, personal or other special relationship between landlord and tenant or was determined by a written lease which had been in force for six months or more on said date and such rent was greater or less than the rent for comparable accommodations in the Birmingham Defense-Rental Area on April 1, 1941.

(c) Appropriate provision should be made with respect to evictions, other actions relating to the recovery of possession, and the modification of services; and appropriate provision should be made to prevent the circumvention or evasion of maximum rents by any method whatever.

Section 1388.104. **Maximum rent regulation.** If within sixty days after the issuance of this declaration, rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by state or local regulation, or otherwise, in accordance with the foregoing recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act of 1942.

Section 1388.105. **Effective date.** This designation and rent declaration (Sections 1388.101 to 1388.105, inclusive) is effective March 2, 1942.

Leon Henderson,  
Administrator.